85-739

No. _____

Supreme Court, U.S.
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IN THE
# Supreme Court of the United States
OCTOBER TERM, 1985

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ROWLAND LAMAR ALLEN,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

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October 31, 1985

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## QUESTIONS PRESENTED

The following questions are presented by this petition for writ of certiorari:

I. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FAILED TO APPLY THE PROPER STANDARD OF "MATERIALITY" AS ESTABLISHED BY THIS COURT IN UNITED STATES v. BAGLEY, 473 U.S. _____, 105 S.Ct. _____, 87 L.Ed.2d 481 (1985), WHEN RULING ON PETITIONER'S CLAIM THAT HIS CONVICTION MUST BE REVERSED DUE TO A VIOLATION OF BRADY v. MARYLAND, 373 U.S. 83 (1963).

II. WHETHER PETITIONER'S CONVICTION ON COUNT THREE OF THE INDICTMENT SHOULD BE REVERSED DUE TO THE GOVERNMENT'S FAILURE TO DISCLOSE EVIDENCE IN ITS POSSESSION WHICH WAS MATERIAL AND FAVORABLE TO THE DEFENSE, AND HAD THE EVIDENCE BEEN DISCLOSED TO THE DEFENSE, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

III. WHETHER PETITIONER'S CONVICTIONS ON COUNTS TWO AND COUNT FIVE OF THE INDICTMENT SHOULD ALSO BE REVERSED DUE TO THE GOVERNMENT'S FAILURE TO DISCLOSE EVIDENCE IN ITS POSSESSION WHICH WAS MATERIAL AND FAVORABLE TO THE DEFENSE AND HAD THE EVIDENCE BEEN DISCLOSED TO THE DEFENSE, THE RESULT OF THE PROCEEDING WOULD HAVE BEEN DIFFERENT.

## PARTIES TO THE PROCEEDING IN THE COURT WHOSE JUDGMENT IS SOUGHT TO BE REVIEWED

All of the parties in the United States Court of Appeals for the Eleventh Circuit are listed in the caption of this case. All additional defendants who were parties in the case before the United States District Court for the Northern District of Georgia were acquitted of all charges and, therefore, no longer have an interest in this case.

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No. _____

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ROWLAND ALLEN,

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

---

The Petitioner, Rowland Lamar Allen, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on July 15, 1985.

## OPINIONS BELOW

The per curiam opinion of the United States Court of Appeals for the Eleventh Circuit was not reported and appears in the Appendix at page 1a. That court's order denying the petition for rehearing is also printed in the Appendix at page 3a.

## JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on July 15, 1985, affirming Petitioner's conviction of October 3, 1984. The Court of Appeals denied a timely petition for rehearing on August 19, 1985. On October 16, 1985, this Court granted Petitioner's application for an extension of time to and including November 1, 1985. This petition for writ of certiorari was

filed prior to that date. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1).

## CONSTITUTION AND STATUTES

1. The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall be ... compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner ROWLAND LAMAR ALLEN and seven other defendants were indicted in the Northern District of Georgia in a ten-count indictment. Petitioner entered a plea of not guilty to Counts One through Ten of the indictment and trial began on July 9, 1984. The government voluntarily dismissed Count Four of the indictment and the trial court entered judgments of acquittal in favor of Petitioner Allen on Count One, continuing criminal enterprise, and Count Six, distribution of cocaine. On July 25, 1984, the jury found the Petitioner guilty of the remaining counts. All other defendants were acquitted.

On August 1, 1984, Petitioner filed a Motion for Judgment of Acquittal, or in the Alternative, for a New Trial on All Counts. On August 24, 1984, Petitioner filed an Amended Motion for Judgment of

Acquittal, or in the Alternative, a Motion for New Trial on All Counts. A lengthy evidentiary hearing was held on these motions on September 28, 1984, but at the conclusion of the hearing the court denied the motions.

Petitioner was convicted on Count Two of conspiracy to possess and distribute narcotics, and was sentenced to ten (10) years imprisonment. On Count Three, Petitioner was convicted of distribution of cocaine and was sentenced to five (5) years imprisonment with a special parole term of three (3) years to run consecutive to the sentence of imprisonment imposed on Count Two. On Count Eight, Petitioner was convicted of income tax evasion and was sentenced to a term of imprisonment of five (5) years and a fine of $10,000.00 to run concurrent with the sentence imposed on Count Two. On Counts Five and Seven, Petitioner was convicted of distribution of

cocaine. The court suspended imposition of sentence, and imposed a period of five years probation to run consecutive to the sentences imposed on Counts Two, Three and Eight. On Counts Nine and Ten, Petitioner was convicted of failing to file tax returns for the years 1980 and 1981. The court suspended imposition of sentence and imposed a period of five (5) years probation to run consecutive to the sentences imposed in Counts Two, Three and Eight. This petition for writ of certiorari is directed to only Counts Two, Three and Five of the indictment.

Count One of the indictment, charging that Petitioner engaged in a continuing criminal enterprise, also included a claim for forfeiture of substantial amounts of real property. Since Petitioner was acquitted on Count One, the government did not pursue the forfeiture under 21 U.S.C. §848(a). However, on March 9, 1984, three

days after the indictment was returned, the government also filed civil forfeiture proceedings under 21 U.S.C. §881(a)(6). Default judgments against Petitioner and numerous other claimants were entered in the forfeiture actions.

On April 25, 1984, Petitioner's trial counsel filed a Consolidated Motion for Discovery, which included a general request pursuant to Brady/Agurs/Giglio for exculpatory information and also a specific request for any statements made by government witnesses which tended to impair or reflect adversely on their reliability as witnesses and any information which tended to contradict the testimony which the government anticipated would be given by any of its witnesses.

Additionally, in response to a motion for a bill of particulars, the government stated that the evidence as to Count Three would show that Petitioner distributed 3

ounces of cocaine to Henry Barnes in January 1980 and accepted in exchange or as collateral therefor a security interest in Barnes' residence at 1546 Alder Lane. Barnes was the sole government witness as to Count Three.

At trial, Henry Barnes was the first witness and the key witness for the government. Barnes testified that he and Petitioner began selling cocaine and marijuana in 1977 and 1978. Petitioner and Barnes, or Barnes alone, would travel to Miami, Florida, to meet with Petitioner's drug source and obtain drugs. Barnes and Petitioner would then return to Atlanta where they prepared and packaged cocaine and marijuana for resale. Barnes and Petitioner each had their own customers. Petitioner's customers included an individual named Hill who purchased two to three ounces of cocaine a day, according to Barnes. Billy Goodson, Curtis Walker,

Vernon Gardner and Buddy Gardner were also named as frequent customers of Barnes and Petitioner. Walker and Buddy Gardner were witnesses against Petitioner.

Barnes testified that in January 1980 he was no longer Petitioner's partner in the drug business and sought to purchase three ounces of cocaine from Petitioner. In exchange, he gave Petitioner a deed to secure debt on his house located at 1546 Alder Lane in Atlanta, Georgia. He testified that the value of the cocaine was $4,500.00, but, since he owed Petitioner additinal money, they agreed on a total note of $7,000.00.

Barnes lived with another witness named Annie Boone. Barnes testified that Boone would distribute drugs to Petitioner's customers, receive the payment and then give the money to Petitioner. Boone corroborated this testimony.

According to Barnes, he and

Petitioner prepared packages of cocaine for distribution at a co-defendant's townhouse. Petitioner sometimes paid Barnes in cocaine for his work and Barnes would sue some of the cocaine and sell the rest.

The other four primary government witnesses were also customers or unindicted co-conspirators of Petitioner.

After trial, Petitioner filed an amended motion for new trial due to the failure of the government to disclose an affidavit of Barnes, which directly contradicted his testimony on Count Three regarding the Alder Lane property.

At a post-trial hearing on this issue, the evidence established that on March 9, 1984, the government seized numerous properties in which Petitioner had an interest, pursuant to the civil forfeiture actions brought under 21 U.S.C. §881(a)(6). Mildred Barnes, Henry Barnes'

ex-wife, was living in the Alder Lane property at the time of seizure. She retained a lawyer, Nicholas Dumich, to represent her in the forfeiture proceeding. Ms. Barnes told Dumich that Petitioner had approached her after the property was seized and offered to sign a quitclaim deed transferring the property back to either Henry or Mildred because Henry had transferred it to Petitioner's corporation to prevent Ms. Barnes from receiving it during the Barnes' divorce action. Dumich learned that Barnes had been convicted of drug offenses and was in the federal witness protection program. Dumich wrote Barnes a letter telling him that he suspected that Barnes had fraudulently transferred the property to prevent Mildred from receiving it. The letter was sent to the Bureau of Prisons, which eventually forwarded the letter to Barnes.

On April 20, 1984, Barnes called Dumich collect and told Dumich that the facts related in his letter describing the fraudulent transfer to Petitioner's corporation were true. Barnes told Dumich that he was "hot" over the divorce and transferred the property to keep his wife from getting it. Barnes did not mention that any narcotics were involved as consideration for the transfer of property.

On May 1, 1984, Dumich filed a petition for remission of forfeiture with the Drug Enforcement Administration (DEA) and recited the information he had received from Henry and Mildred Barnes. Concurrently, Dumich prepared an affidavit for Barnes' signature and mailed it to him. The petition recited Dumich's legal theory that the property was not obtained as a result of a drug transaction, but was a fraudulent transfer to prevent Ms. Barnes from receiving it during the divorce

proceeding. Dumich did not know that Barnes was scheduled as a witness against Petitioner in the criminal case.

Barnes signed the affidavit Dumich had prepared and returned it to him. The affidavit is included in the Appendix at page 5a. Dumich received the signed affidavit on or about May 13, 1984, and immediately mailed it to Raymond Vinsik of the DEA. Sometime later, but definitely prior to trial, DEA Special Agent Tammara Connolly called Dumich and informed him that it was their recommendation that the petition for remission would be granted. At the hearing on the motion for new trial, a transmittal slip signed by Connolly indicated that the DEA's recommendation was submitted to the United States Attorney's Office June 4, 1984. Petitioner's trial began July 9, 1984. After the criminal trial was over, Dumich contacted Petitioner's trial counsel to obtain a

quitclaim deed from Petitioner to Ms. Barnes. At that time, trial counsel first learned of the existence of the Barnes affidavit, which had directly contradicted his testimony at trial. Trial counsel promptly filed the amended motion for new trial.

The DEA recommendation that the petition for remission be granted was transmitted to Barbara Tinsley, Assistant United States Attorney in charge of the civil forfeiture proceedings. Ms. Tinsley testified that she received the Barnes affidavit on June 21, 1984, and transmitted the same to the Criminal Division, Department of Justice, in Washington, D.C., on June 26, 1984. Ms. Tinsley knew that the criminal trial was to begin July 7, 1984, but did not know that Barnes was to be a witness against Petitioner. Ms. Tinsley testified that she did have some conversations with Ms. Janet King, the

Assistant United States Attorney in charge of the criminal prosecution of Petitioner, but that they purposefully limited their conversations due to mutual concerns over Rule 6, Federal Rules of Criminal Procedure.

Despite King's and Tinsley's agreement not to discuss the criminal case, Tinsley did know that the criminal indictment included a complaint for forfeiture of the property under the continuing criminal enterprise count. Tinsley was also aware that there was some overlap of the properties named in the criminal forfeiture and the civil forfeiture she was pursuing. Moreover, U.S. Attorneys King and Tinsley and DEA Case Agent Melvin Smith appeared together before the district court when the government sought seizure of Petitioner's properties, pursuant to 21 U.S.C. §881. King testified that she was present at that proceeding to answer any questions about

the criminal indictment. King did not physically receive the Barnes affidavit until August 21, 1984.

Nevertheless, there was substantial evidence that the criminal prosecutorial arm of the U.S. Attorney's Office did have knowledge of the affidavit. Ernest Lee Howard, a DEA criminal investigator and supervisor of the Special Agents who worked on the forfeitures, testified that he knew the criminal case involved Henry Barnes and that Barnes would be testifying. He also knew that subsequent to the seizure the Special Agents were investigating a petition for remission filed by Barnes' ex-wife. During the course of this investigation, Howard spoke with Melvin Smith, who was both the DEA case agent in the criminal case and the agent who signed the affidavit in support of the civil forfeiture.

Howard read the Barnes affidavit and

assigned it to the agents who were working on the forfeiture. He also approved their reports recommending that the petition for remission be granted and sent a copy of the recommendation to the U.S. Attorney's Office. It was his belief that the recommendation would have gone to either King or Tinsley.

Barnes also testified at the hearing on the motion for new trial. He stated that he told Dumich that he would do whatever the attorney wanted him to do and would sign an affidavit or whatever was necessary so that his ex-wife and children would get the property. He testified that he did not pay any particular attention to the affidavit, although he knew certain portions of it were "wrong," but just went ahead and signed it. He testified that he did not tell King or Smith about the letter or the affidavit because they never asked.

The trial court denied Petitioner's motion for new trial and this issue was raised on direct appeal to the United States Court of Appeals for the Eleventh Circuit. On July 2, 1985, after the briefs had been filed, but before the Court of Appeals decided Petitioner's case, this Court decided United States v. Bagley. On July 10, 1985, Petitioner's counsel informed the Eleventh Circuit of the relevance of the Bagley decision by way of a letter to the Clerk of Court. The Eleventh Circuit affirmed Petitioner's conviction by a per curiam opinion issued on July 15, 1985. Thus, the opinion does not indicate whether or not the panel considered Bagley and applied the test of materialty established therein. However, Petitioner's appellate counsel filed a timely petition for rehearing and suggestion for en banc consideration with the Eleventh Circuit in which it was argued

that this Court's decision in Bagley and Brady mandated reversal of the narcotic conviction on Count Three of the indictment. On August 19, 1985, the Eleventh Circuit denied the petition for rehearing.

## BASIS OF JURISDICTION IN THE COURT OF FIRST INSTANCE

Jurisdiction of the United States District Court for the Northern District of Georgia was invoked under the provisions of 18 U.S.C. §3231.

## REASONS FOR GRANTING THE WRIT

1. This Court's decision in United States v. Bagley, 473 U.S. _____ (1985), established a standard of materiality contrary to that employed by the trial court and the Eleventh Circuit Court of Appeals and contrary to that relied upon by the government in opposition to Petitioner's motion for new trial and on appeal.

In Brady v. Maryland, 373 U.S. 83, 87 (1963), this Court held that, "suppression by the prosecution of evidence favorable to

an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." The rule in Brady is premised upon the due process requirements of the Fifth and Fourteenth Amendments. United States v. Bagley, 473 U.S. at _____, 87 L.Ed.2d at 489. Subsequent courts have correctly characterized Brady as a rule of fundamental fairness designed to ensure a fair trial by requiring the prosecution to meet a minimal obligation of disclosure; Brady is not a rule of evidence or discovery. See, United States v. Beasley, 576 F.2d 626 (5th Cir., 1978), cert. denied, 440 U.S. 947 (1979).

The standard of determining the materiality of Brady evidence was discussed by this Court in United States v. Agurs, 427 U.S. 97 (1976). Three different situations were described: (1) the

prosecution's case included perjured testimony and the prosecution knew or should have known of the perjury; (2) defense counsel made a specific pretial request for "material" Brady evidence, and (3) those situations where no request or only a general request for Brady evidence were made. The Agurs court held that the standard of materiality in the third situation is whether the omitted evidence, evaluated in the context of the entire record, creates a reasonable doubt, that did not otherwise exist. Id. at 112. However, the court suggested that a different standard would be applied to cases of perjured testimony or cases where the defense makes a specific request and the prosecutor fails to disclose responsive evidence. Id. at 103-06. Moreover, in Giglio v. United States, 405 U.S. 150, 154 (1972), this Court held that impeaching evidence fell within the general rule of

Brady and a new trial would only be required if the non-disclosed evidence could in any reasonable likelihood have affected the judgment of the jury.

As a result of the several decisions of this Court, the individual circuit Courts of Appeals have often been confronted with difficult decisions as to which standard of materiality to apply. The courts' decisions have lacked uniformity and predictability due to the necessity of characterizing the type of evidence sought, the type or extent of Brady requests, and the use of the evidence by either the prosecution or defense. The Eleventh Circuit is no exception. At the time the district court ruled on Petitioner's motion for new trial, the Eleventh Circuit utilized four different standards of materiality. These standards were summarized as follows:

> If the defense makes a specific request for material that is

suppressed the standard of materiality is whether the suppressed evidence might have affected the outcome of the case. ... If the request is for Brady material in general or if no request is made at all, the test for materiality is whether the suppressed evidence creates a reasonable doubt that did not otherwise exist. ... Where the prosecution has either actual or constructive knowledge that its case is based on false evidence or perjury, suppressed evidence is material if there is any reasonable likelihood that the false evidence could have affected the judgment of the jury. ... If the suppressed evidence is purely impeaching evidence and no defense request has been made, the suppressed evidence is material only if its introduction probably would have resulted in acquittal.

United States v. Blasco, 702 F.2d 1315, 1327-28 (11th Cir.), cert. denied, 104 S.Ct. 275 (1983) (citations omitted).

In Petitioner's case, the government argued that only a general request was made and that the proper standard to be applied was that set forth in Blasco; that the evidence is material only if its introduction probably would have resulted in an acquittal.

While the appeal of this case was pending before the Eleventh Circuit, this Court decided United States v. Bagley, supra. Bagley establishes several important issues and alters the standard of materiality which heretofore had been applied in the Eleventh Circuit. First, Bagley clearly holds that no distinction should be made between impeachment evidence and exculpatory evidence. 473 U.S. at _____, 87 L.Ed.2d at 490. Second, the decision sets forth one test to be used in all cases, whether there is "no request," a "general request," or a "specific request." 473 U.S. at _____, 87 L.Ed.2d at 494. Last, the non-disclosed evidence is considered material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a

probability sufficient to undermine confidence in the outcome." Id.

The appellate court's rendering of a per curiam affirmance of Petitioner's conviction is unfortunate as it leaves all parties unsure of what standard of materiality was applied and how the Court reached its conclusion. However, it is clear that the Eleventh Circuit has consistently applied materiality tests of varying degrees depending on the circumstances of the individual case. See, Maddox v. Montgomery, 718 F.2d 1033, 1035-36 (11th Cir. 1983); United States v. Walker, 720 F.2d 1527, 1535 n.5 (11th Cir. 1983), cert denied sub nom, 104 S.Ct. 1614 (1984). In the two recent published decisions of the Eleventh Circuit where Brady violations were at issue, the Elventh Circuit has failed to apply, or even mention, this Court's decision in Bagley.

See, United States v. Cotton, 770 F.2d 940 (11th Cir. 1985); United States v. Dekle, 768 F.2d 1257, 1263 (11th Cir. 1985).

Petitioner urges that this Court grant this petition for writ of certiorari since the district court applied the wrong standard of materiality and it is highly likely that the Court of Appeals also applied an incorrect standard. At the very minimum, Petitioner urges that the petition be granted and the case be remanded for a statement of the standard applied and its application to the specific facts of this case.

2. The decision to deny the motion for new trial due to the government's failure to disclose to the defense material evidence in its possession is in direct conflict with this Court's decisions in United States v. Bagley, 473 U.S. (1985), and Brady v. Maryland, 373 U.S. 83 (1963).

This petition for writ of certiorari should be granted because, regardless of what standard of materiality was applied by the Eleventh Circuit, the decision to deny the motion for new trial was clearly erroneous under the facts and circumstances of this case.

Henry Barnes was the sole witness against Petitioner on Count Three of the indictment and was a key witness on Counts Two and Five. With respect to Count Three, the government's sole factual theory, as set forth in the bill of particulars and as established by the evidence at trial, was that Petitioner gave Barnes drugs in return for the security deed on Barnes' residence. The affidavit which Barnes provided to his ex-wife's attorney for use in the civil forfeiture action directly contradicted his trial testimony. See, Appendix at 5a.

Moreover, the facts establish that the affidavit clearly fell within the realm of Brady v. Maryland. A violation of Brady occurs when the defendant proves (1) the prosecution's suppression of evidence, (2) the favorable character of the suppressed evidence for the defense, and (3) the materiality of the suppressed evidence. Moore v. Illinois, 408 U.S. 786, 794-95 (1972); Halliwell v. Strickland, 747 F.2d 607, 609 (11th Cir. 1984).

The affidavit was in the possession of both the Drug Enforcement Administration (DEA) and the United States Attorney's Office for the Northern District of Georgia. The fact that Janet King, the Assistant U.S. Attorney handling the criminal prosecution, was not aware of the affidavit or was negligent in failing to discover the same, is irrelevant because the good faith or bad faith of the prosecution is not at issue. 373 U.S. at

87. Mere possession of the non-disclosed evidence imputes knowledge to the prosecutor even if he is unaware of such possession. United States v. Agurs, 427 U.S. at 110; United States ex rel. Smith v. Fairman, 769 F.2d 386, 391-92 (7th Cir. 1985); Walker, supra, at 1535. "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." Agurs, 427 U.S. at 110.

The courts interpreting Brady have required some duty of inter-agency discovery and that duty is not discharged by the prosecutor merely disclosing what he intends to use at trial and those things in his actual possession. See, United States v. Jensen, 608 F.2d 1349 (10th Cir. 1979). The duty to disclose should affect not only the prosecutor, but the government as a

whole. United States v. Caldwell, 543 F.2d 1333, 1352 n.9 (D.C. Cir. 1975), cert. denied, 423 U.S. 1087 (1976). The duty of disclosure has been applied to DEA agents with non-prosecutorial status, United States v. Turner, 490 F.Supp. 583, 603 (E.D. Mich. 1979), aff'd., 633 F.2d 219, cert. denied, 450 U.S. 912 (1981), and to federal government psychiatrists, United States v. Morgan, 567 F.2d 479 (D.C. Cir. 1977).

Here, the facts unquestionably established that the affidavit was in the possession of DEA on May 1, 1984, and was in the possession of the United States Attorney's Office by June 4, 1984.

It is also clear that the affidavit is "material" under whatever standard is applied. The affidavit contradicted the testimony of the sole witness on Count Three of the indictment as to a material

element of the offense. There is much more than a "reasonable probability" that had the evidence been disclosed, the result of the proceeding would have been different. There is no question but that the affidavit, whether used as exculpatory evidence or as impeaching evidence, or both, undermines the confidence in the outcome on Count Three. The affidavit also constitutes newly discovered evidence justifying the granting of a new trial, pursuant to Rule 33, Federal Rules of Criminal Procedure.

The affidavit should have also been found to be material to Counts Two and Five. While other witnesses for the government presented evidence as to a conspiracy to distribute narcotics, it should be noted that the evidence was conflicting and hotly disputed. Petitioner was acquitted on three counts of narcotics

offenses and all other defendants were acquitted of all narcotics offenses, including the conspiracy count.

Last, the affidavit creates a strong inference of either perjury in the criminal case or of a false statement in the civil forfeiture case. Whichever is the case, the credibility of Barnes is highly questionable and would certainly undermine confidence in the entire proceeding.

3. The affirmance of Petitioner's conviction by the court below establishes a potentially dangerous precedent in the Northern District of Georgia which would allow the Criminal Division of the United States Attorney's Office to remain purposefully ignorant of exculpatory or perjured testimony which has been submitted to a different division of that office.

As noted above, Brady establishes that the good faith or bad faith of the prosecutor is irrelevant to whether or not a violation has occurred. 373 U.S. at 87. As recently stated by this Court in Bagley,

the rule in Brady is based upon the requirement that there must be due process before one is deprived of his liberty. 87 L.Ed.2d at 489. Petitioner does not suggest that there was any deliberate suppression of evidence in the instant case. However, Petitioner feels that to allow the conviction to stand, especially in light of the lack of discussion by the Eleventh Circuit of the Brady issue, establishes a potentially dangerous precedent in this circuit.

The Assistant United States Attorney in charge of the criminal prosecution, testified that she purposefully limited her conversations with members of the Civil Division due to concerns over Rule 6, Federal Rules of Criminal Procedure. Had they not so limited their discussions, she would have learned of the affidavit. Rule 6, however, applies to grand jury

proceedings. Here, the grand jury was long since discharged and the criminal trial was going forward. Rule 6 prevents disclosure of matters occurring before the grand jury. The Barnes affidavit was not a matter occurring before the grand jury, but was submitted for use in the inextricably related civil forfeiture proceeding.

Rule 6(e) was designed in part to shield potential defendants from the government's use of a grand jury as a subterfuge to subpoena documents and records for a purported criminal proceeding and then to use such documents and evidence for a civil prosectuion. Rule 6(e) was never intended to be used as a sword to enable the government to purposefully remain unaware of exculpatory or impeaching evidence.

As noted by this Court in Bagley, an omission to disclose favorable evidence can

be just as grievous as actual suppression. When, as in this case, the defense requests certain evidence and the government makes an incomplete response to the request, this not only deprives the defense of certain evidence, but has the effect of representing to the defense that the evidence does not exist. As a result, the defense might abandon certain lines of investigation, defenses or trial strategy that it might otherwise have pursued. 87 L.Ed.2d at 494. A minimum, but affirmative, duty was imposed upon prosecutors in Brady and Bagley and a policy not to discuss related cases should not be allowed to thwart that duty.

## CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 31, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 84-8805

D.C. Docket No. 84-66

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROWLAND LAMAR ALLEN,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Georgia

(July 15, 1985)

Before RONEY and FAY, Circuit Judges, and
DUMBAULD*, District
Judge.

PER CURIAM: AFFIRMED. See Circuit Rule 25.

*Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

Judgment Entered: July 15, 1985
For the Court: Spencer D. Mercer, Clerk

By: (Signature)
Deputy Clerk

ISSUED AS MANDATE: August 28, 1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion July 15, 11th Cir., 1985, ____ F.2d ____)

(August 19, 1985)

Before RONEY and FAY, Circuit Judges, and DUMBAULD*, District Judge.

PER CURIAM:

(x) The Petition for Reharing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion of Rehearing En Banc is DENIED.

ENTERED FOR THE COURT;

(Signature)
United States Circuit Judge

*Honorable Edward Dumbauld, U.S. District Judge for the Western District of Pennsylvania, sitting by designation.

AFFIDAVIT OF HENRY LEE BARNES

Personally appeared before the undersigned officer, duly authorized to administer oaths, Henry Lee Barnes, who being sworn, deposes and says as follows:

1.

This affidavit is made on personal acknowledge, and it is intended that it be relied upon in considering any petition for remission in connection with the seizure of property located at 1546 Adler Lane, Atlanta, Georgia and any federal forfeiture proceedings relating to said property, and for all purposes, without limitation, authorized by law.

2.

During the year of 1974, I became separated from my then spouse Mildred Barnes, because of marital difficulties. Immediately prior to our separation I resided with her and my children at our house located at 1546 Adler Lane, Atlanta, Georgia, which was purchased in my name on October 7, 1969.

3.

Following the 1974 separation, my wife and children remained on the property

while I moved and resided at another location. Mildred Barnes made the mortgage payments on the property, and as far as I am aware and to the best of my acknowledge, she has lived at the 1546 Adler Lane address with our two children from the time of the purchase of the property to the present.

4.

In December 1979, Mildred Barnes filed an alimony petition against me in the Superior Court of Fulton County, Georgia.

I became concerned that as a result of the alimony petition and the probability of a future divorce, I would lose my interest in the 1546 Adler Lane property. I thus contacted friends of mine who are associated with the corporation known as Property Pickup, Inc., and ask them if they would obtain possession of my property until after any alimony or divorce proceeding was concluded. I thus planned to regain the property and retain title in my own name at a later date.

5.

On January 14, 1980, I executed a deed to secure debt to the 1546 Adler Lane property, naming Property Pickup, Inc. as the grantee. We cited in the deed to secure debt that a $7,200.00 loan had been made to me; however, this loan was actually never made, and no money or other consideration ever changed hands. It was never my intent to give up my interest in the property to Property Pickup, Inc. and I fully expected to regain title at a later date after my domestic problems had concluded.

7.

As far as I know, Mildred Barnes had no knowledge of my relationship with Property Pickup, Inc. or any individuals associated with it including Mr. Ron Allen. As far as I know, Mildred Barnes has no knowledge of any of the activities of Property Pickup, Inc. either legal, illegal, or otherwise.

Further affiant saith not, this 10th day of May, 1984.

(Signature)
Henry Lee Barnes

(Attestation)